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No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED APRIL 21, 1986

BEST AVAILABLE COPY

I

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a covenant not to sue public officials for violations of constitutional rights, extracted under the threat of pending criminal indictment, prosecution, trial and punishment, and obtained for *nolle prosequi* of criminal charges, is void as against public policy.

LIST OF ALL PARTIES

TOWN OF NEWTON (NEW HAMPSHIRE),
a municipal corporation;

DAVID T. BARRETT,
individually and as Chief of Police
for the Town of Newton;

KENNETH L. BOWERS, WILLIAM J. COOK and
MARY ALLEN, individually and in their official
capacities as Selectmen for the Town of Newton;
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

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BRIEF FOR RESPONDENT

Opinions Below

The opinions below are adequately set forth in the Brief for Petitioners.

Jurisdiction

The jurisdictional requisites are adequately set forth in Brief for Petitioners.

Constitutional and Statutory Provisions

The constitutional and statutory provisions are adequately set forth in the Brief for Petitioners.

Counter-Statement of the Case

Factual Setting

Mr. Rumery, a middle-aged insurance representative, has lived all his life with his wife and children in the small rural New England village of Danville, New Hampshire. (J.A. 24). Rumery has had no other criminal arrests or criminal record. (J.A. 29). Rumery knew Mary Deary and her husband, both of Newton, New Hampshire, (which borders Danville), socially since approximately 1979, and had helped Mrs. Deary with insurance matters after her husband's death. (J.A. 25).

In March, 1983, after reading in a local newspaper that a mutual aquaintance, David Champney, had been arrested for sexual assault, Rumery telephoned Deary to ask whether she knew anything about the matter. (J.A. 25-26). During that telephone conversation, Deary confided in Rumery that she was the victim of the assault. (J.A. 25).

No further conversations between Deary and Rumery occurred until May 11, 1983, when Deary telephoned Rumery at his insurance office and expressed her reluctance to go forward with the criminal charges against Champney. (J.A. 26). Rumery testified in the District Court below that the telephone conversation was as follows:

> Deary: Well, I didn't want—David is a victim. I like David and he's the victim. I don't—I don't understand. He has to give [his wife] money. Her boyfriend's giving her money. The only money I'm getting is from John Hancock. He is the victim. I feel sorry for him.
>
> Deary: I don't know what to do. I don't want to hurt him. I don't know what to do.

Rumery: Well if you feel that way towards him then you can—it's possible to, to end this case. It's possible to stop the case.

Deary: Well I was told I couldn't.

Rumery: Well you can call the County Attorney if you want and talk to them about it.

Deary: I'm not a bad person. I'm not vindictive.

Rumery: Well that's up to you. That's all I can say. Look Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office at 11 o'clock tomorrow morning. (J.A. 26-27).

On the very next day, at approximately 10:30 p.m., Chief of Police for the Town of Newton, David T. Barrett, with another police officer present, arrested Rumery at his home in the presence of his wife. (J.A. 27-28). Rumery was told by Chief Barrett that he harassed Deary and threatened her life. (J.A. 28). Rumery was handcuffed, taken to the Rockingham County Jail, and charged with the Class B Felony of tampering with a witness in violation of N.H. Rev. Stat. Ann. § 641:5(I)(b) (1974). (J.A. 28-29). (Petition, App. D-2).[1]

Prior to arresting Rumery, Chief Barrett consulted with Rockingham County Deputy Prosecutor Brian Graf about Rumery. Barrett was told by Prosecutor Graf that independent corroborating evidence would be required for the prosecution of Rumery. (J.A. 48, 49 & 50). Prosecutor Graf testified in his deposition, which was later used in the District Court below, that:

> From my point of view the problem in terms of prosecuting was to try to get some corroboration of these statements so that the state would not have to rely simply upon the uncorroborated testimony of Mary Deary. . . . The problem that I saw as a prosecutor is at that time I

[1] N.H. Rev. Stat. Ann. § 651:2(II)(b) (1974) fixes a maximum of seven (7) years imprisonment for conviction of a Class B Felony.

> would have to rely strictly on the testimony of Mary Deary because I don't believe there was any other independent evidence that had taken place. (J.A. 48-49).

Prosecutor Graf, however, was "pretty busy at that time" and "didn't have a lot of time to devote to this particular matter." (J.A. 50). Consequently, Prosecutor Graf did not follow up on obtaining any independent corroborating evidence; nor did Chief Barrett. (J.A. 50).

Despite discussing with Prosecutor Graf how to obtain the required independent corroborating evidence before arresting Rumery, Chief Barrett chose not to request an authorization for a wiretap; nor did he obtain a written affidavit from Deary (J.A. 56); nor did he obtain even a tape recorded statement from Deary (J.A. 56). Chief Barrett did not attempt to obtain any independent corroborating evidence whatsoever, despite Prosecutor Graf's expressed concerns, prior to arrest, about the lack of independent corroborating evidence against Rumery. (J.A. 50).

After learning that Rumery had been arrested by Chief Barrett without any independent corroborating evidence, Prosecutor Graf was "surprised" that Rumery had been arrested. (J.A. 50, 51).

Shortly after Rumery's arrest, and prior to indictment or a probable cause hearing, Chief Barrett issued several public statements to local newspapers which were reprinted and included the following proclamation:

> "We're serving notice that we just won't tolerate this kind of activity." (J.A. 22).

Rumery's personal and business relations and reputation in the community were severely damaged as a result of his unlawful arrest. (J.A. 22). Moreover, Rumery experienced severe emotional and psychiatric problems as a result of his unwarranted arrest. (J.A. 21).

Rumery retained Attorney Stephen J. Woods[2] to defend him on the criminal charge. Presentation for indictment before the Rockingham County Grand Jury was scheduled for June 13, 1983 and a probable cause hearing was scheduled for Plaistow District Court on June 14, 1983. (J.A. 19, 20).

Knowing the problems presented in prosecuting Rumery without independent corroborating evidence, and after discussing with Chief Barrett the issue of a potential civil rights action by Rumery against the Town of Newton and the Police Department (J.A. 51, 55), Graf told Attorney Woods that "the State would be willing to drop the prosecution of Mr. Rumery for the witness tampering charge in exchange for Mr. Rumery signing a release indicating that he would not sue the parties involved in the particular case." (J.A. 51). Prosecutor Graf indicated that if Rumery did not sign a covenant not to sue, the criminal process would in all likelihood continue which would include Grand Jury indictment, a probable cause hearing and criminal trial. (J.A. 19). According to Attorney Woods, the state was not willing to *nolle prosse* the criminal charge unless and until Rumery released his civil rights. (J.A. 20).

When presented with the covenant not to sue, Rumery was adamant against signing it. (J.A. 33). Attorney Woods testified in the District Court below that:

> Mr. Rumery felt he had been wronged by the criminal justice system and he wished redress from the criminal justice system. And he was reluctant to have criminal charges dropped in exchange for surrendering his possibility of redress from the system which he felt had wronged him. (J.A. 13).

Attorney Woods' overriding objective in representing Rumery, however, was to clear him, one way or another, of the pending criminal charge. (J.A. 21). Woods later testified

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[2] Stephen J. Woods, Esquire, became the Rockingham County Prosecutor on January 1, 1985, after having been elected in the county.

that he had little, if any, concern about Rumery's potential civil rights action against public officials for misconduct and constitutional violations. (J.A. 18). Woods did not apprise Rumery of any details or specifics about the nature or type of civil rights and remedies Rumery possessed against public officials for their alleged wrongdoings. (J.A. 20-21). Therefore, Attorney Woods recommended that Rumery sign the covenant. (J.A. 14).

While the threat of criminal charges, indictment, prosecution, trial and punishment were still pending against Rumery, he acquiesced and signed the covenant not to sue Mary Deary, the Newton Police Department or its legal representatives, and the Town of Newton or its legal representatives. (Petition, App. E-1). Thereafter, the criminal charges were *nolle prossed* by the prosecution. According to Prosecutor Graf, this was the only case, during his four and a half years as a Deputy County Prosecutor, in which he used a covenant not to sue to protect public officials and a private individual from civil rights litigation. (J.A. 55-56).

Jurisdictional Setting

In April 1984, Rumery filed in the United States District Court for the District of New Hampshire a six count[3] Complaint pursuant to 42 U.S.C. § 1983 (1982) alleging both federal

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[3] Respondent filed a Motion to Amend the Complaint to add Count VII which alleged that Prosecutor Graf was acting as agent for the Town of Newton, Chief of Police and Police Department in his role to obtain the forfeiture of Rumery's federal and state rights by virtue of the covenant not to sue. (J.A. 2—N.R. 15). While the District Court did not rule directly on the Motion to Amend, the District Court agreed that Prosecutor Graf was an authorized agent of the Petitioners. In the Court's Order dated April 29, 1985, the District Court stated: "The State and its subdivisions which include all Defendants by agreeing to the covenant through its *authorized representative*, Graf, gave up a potential defense to a possible lawsuit (which turned out to be an actual lawsuit) (emphasis added)." (Petition, App. B-4).

and pendent state law[4] claims arising from his arrest for witness tampering. Petitioners pled the covenant not to sue as an affirmative defense and the District Court dismissed the complaint finding that the covenant not to sue was valid. Judgment was entered on April 30, 1985.

Respondent filed an appeal with the Court of Appeals for the First Circuit in a timely fashion which reversed and remanded the District Court's decision on the grounds that the covenant not to sue was void as against public policy. The Circuit decision below was rendered on December 2, 1985. Petitioners filed their Petition for a Writ of Certiorari with this Court on February 28, 1986, which was granted on April 21, 1986.

Summary of Argument

Pre-conviction release/dismissal practices which involve extracting civil releases or covenants not to sue under threat of criminal indictment and prosecution are too injurious to be allowed and are void as against public policy.

Argument

I. Pre-Conviction Release/Dismissal Practices Are Too Injurious To The Public Interest To Be Sanctioned By This Court.

The First Circuit decision below unanimously held that covenants not to sue public officials for alleged violations of constitutional rights, when extracted under the threat of criminal indictment, prosecution, trial and punishment, and obtained for a decision not to prosecute on criminal charges are too injurious to the public interest to be condoned, sanc-

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[4] Respondent's state law claims alleged negligence, defamation, false imprisonment, negligent infliction of emotional distress and state constitutional violations (N.H. Constitution Part I, § 2 (Natural Rights); Part I, § 12 (Life, Liberty and Property); and Part I, § 15 (Rights of Accused)).

tioned, promoted or encouraged by the Court. *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985). Five specific areas of public interest are severely compromised as a result of such pre-conviction release/dismissal practices:

A. Pre-conviction release/dismissal practices suppress complaints and evidence of public offical abuse and misconduct;
B. Pre-conviction release/dismissal practices violate constitutional rights of a civil complainant;
C. Pre-conviction release/dismissal practices leave unremedied deprivations and violations of constitutional rights;
D. Pre-conviction release/dismissal practices tempt prosecutors to trump up charges in retaliation to/or in anticipation of civil rights claims; and
E. Pre-conviction release/dismissal practices create judicial administration burdens.

A. *Pre-Conviction Release/Dismissal Practices Suppress Complaints and Evidence of Public Official Abuse and Misconduct.*

> The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. *Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society.*

So stated Chief Justice Bazelon when the Court of Appeals for the District of Columbia was presented with a pre-conviction release/dismissal arrangement. *Dixon* v. *District of Columbia*, 394 F.2d 966, 968-69 (D.C. Cir. 1968). In *Dixon* a "tacit agreement" not to press criminal charges in exchange for a release of civil rights in a pre-conviction setting was addressed by the Court. The Court condemned pre-conviction release/dismissal practices as "odious" and against the public interest. *Dixon*, 394 F.2d at 969.

The public has legitimate and compelling interests in exposing to full public inquiry all civil complaints of public official misconduct and abuse of power. The effect of pre-conviction release/dismissal practices is to foreclose public inquiry into and exposure of unconstitutional and illegal government practices and suppress public official misconduct and abuse. *Bushnell* v. *Rossetti*, 750 F.2d 298, 301 (4th Cir. 1984). It was on this ground, *inter alia*, which the Circuit decision below distinguished pre-conviction release/dismissal practices from post-conviction release/dismissal practices. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985).

The decisions of *Bushnell* v. *Rossetti*, 750 F2d 298 (4th Cir. 1984) and *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981) are the only two federal decisions which have condoned the use of release/dismissal practices. In both cases, however, the release/dismissal practices were conducted in post-conviction settings. In a post-conviction setting, police practices that ordinarily would be the subject of a 42 U.S.C. § 1983 (1979) claim would have been already exposed to full public inquiry during the criminal trial. *Bushnell*, 750 F.2d at 301.

In all other reported federal decisions, release/dismissal practices by prosecutors and police have involved "pre-conviction" settings, such as in the case at bar. *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985); *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975); *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *Horne* v. *Pane*, 514 F.Supp. 551 (S.D.N.Y. 1981). All of those decisions have condemned release/dismissal practices as against public policy. In a pre-conviction setting, allegations of public official misconduct and abuse have not yet received public exposure and inquiry. Such practices are highly injurious to the public interest and the public's right to know.

The public has a legimate and compelling interest in *not* suppressing complaints and evidence of official misconduct and abuse. Yet, Petitioners encourage this Court to adopt a

public policy which will promote and encourage prosecutors and police routinely to shield public official misconduct and abuse of power from public inquiry and exposure that could serve to uncover patterns of abuse and correct patterns of misconduct.

The public also has a legitimate and compelling interest in *not* barring meritorious civil complaints against public official misconduct and abuse. *See Gray* v. *City of Galesburg*, 71 Mich.App. 161, 247 N.W.2d 338, 340 (1976). While some civil actions alleging public official misconduct and abuse may be without merit, it is not the proper function of a prosecutor or police to unilaterally decide which civil actions have merit and which do not. Prosecutors and police are neither judge nor jury; they are not impartial; they hear no evidence; their decisions are not subject to judicial review or appeal. To permit and encourage prosecutors and police to "use the heavy threat of criminal prosecution to induce potential [civil] plaintiffs to waive their right of action presents too great a risk [to the public] that [they] will use the power to bar meritorious cases, leaving the victims of unlawful arrest without civil redress and concealing misconduct by the arresting party from judicial scrutiny." *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 638-39, 170 Cal.Rptr. 42 (1980) (Tobriner, J. dissenting with Byrd, C. J. and Newman, J., concurring).

As Judge Duniway stated in *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970):

> It is no part of the proper duty of the prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case. The situation is made no better by the fact that

> here the record indicates that it was the court that asked MacDonald whether he would stipulate. Rather, it makes it worse. It brings the court to the aid of the prosecutor in coercing the defendant into agreeing to what amounts to a forfeiture of his civil rights.

Id. at 375.

Courts should not "become the 'enforcers' of these odious agreements" by encouraging or promoting suppression of complaints and evidence against public officials for misconduct and abuse. *Dixon* v. *District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968). Such conduct should be thoroughly aired in our free society.

In the case at bar, Respondent's complaints and evidence of civil wrongdoing by the police, municipality and prosecutor against him, in violation of his constitutionally granted civil rights, will be suppressed if the release is permitted to stand. The public's interest, as well as Respondent's, will be severely compromised, impaired and prejudiced by the suppression and non-disclosure of such illegal conduct.

B. *Pre-Conviction Release/Dismissal Practices Violate Constitutional Rights of Civil Complainants.*

The First Amendment to the Constitution of the United States protects the fundamental right of a civil complainant to petition the government for a redress of grievances. (Petition, App. D-1). Civil litigation is one form of an individual's fundamental right to petition the government for redress. *NAACP* v. *Button*, 371 U.S. 415, 429-431 (1963). The constitutional importance of access to the courts has been long recognized by this Court. *John* v. *Avery*, 393 U.S. 483 (1968); *Long* v. *District Court of Iowa ex rel. Lee County, Fort Madison, Iowa*, 385 U.S. 192 (1966); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). The First Amendment also protects the freedom of speech and expression of civil litigants. *NAACP* v. *Button*, 371 U.S. at 429-431. When a civil

wrong has been committed by a government against an individual, civil litigation, as a means of exercising the freedoms of speech, expression and petition, is a significant mechanism for exposing, determining and correcting, if necessary, abuse and misconduct of public official power. Such fundamental and constitutional rights should not be violated or inhibited by pre-conviction release/dismissal practices by police or prosecutors.

Permitting and encouraging prosecutors and police to place individuals in "inherently coercive" dilemmas (*Boyd* v. *Adams*, 513 F.2d 83, 88 (7th Cir. 1975)), of surrendering fundamental rights of redress for constitutional violations, rather than risking criminal indictment, prosecution, trial and punishment, has a "chilling effect" on every individual's right to exercise the freedoms of speech, expression and petition. *Cf. Dixon* v. *District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968) ("If for example, the government had legitimately determined not to prosecute appellant and then reversed its position solely because he filed a complaint, this would clearly violate the First Amendment. The government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.")

Furthermore, pre-conviction release/dismissal practices violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Circuit Court of Appeals for the District of Columbia stated:

> Moreover, a prosecution under such circumstances would be barred by the equal protection clause, since the government employs an impermissible classification when it punishes those who complain against police misconduct and excuses those who do not.

Dixon v. *District of Columbia*, 394 F.2d at 968.

In *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970), the Ninth Circuit Court of Appeals indicated that the pre-conviction release/dismissal practice in

that case amounted to a deprivation of the right of access to the courts and was a denial of equal protection and due process. *Id.* at 377.

In the case at bar, Respondent's fundamental and constitutional rights of speech and petition for civil redress, as expressed through civil litigation, were chilled and suppressed by the pre-conviction release/dismissal practice. Further, the pre-conviction release/dismissal arrangement in the present case violated Respondent's right of equal protection under the law. Prosecutor Graf employed an impermissible classification when he extracted a release of civil rights from Respondent, but had never engaged in such practice before.[5] The threat to criminally indict, prosecute, try and punish is, by its very nature, coercive, and an innocent criminal defendant, such as Respondent, will undoubtedly prefer to surrender fundamental and constitutional rights rather than risk the uncertainty of the criminal justice system.

C. *Pre-Conviction Release/Dismissal Practices Leave Unremedied Deprivations and Violations of Constitutional Rights.*

The First Circuit decision below declared that judicial enforcement of pre-conviction release/dismissal arrangements significantly injure the public interest, *inter alia*, by leaving unremedied deprivations of constitutional rights. *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985). The Court stated:

> The deputy county attorney was in a position to use the threat of prosecution as a sword while simultaneously shielding public officials from a civil rights claim. . . . In such a situation the prosecutor alone is holding the trump card to be played for the protection of those against

[5] "This is the only case that I can think of that I have been involved with where this type of resolution is arrived at." (J.A. 56).

> whom a potential civil rights claim may be asserted. This finesse is too injurious to the public interest to be sanctioned.

Id. at 69, 70.

All federal courts which have addressed pre-conviction release/dismissal practices have condemned the practice. *Cf. People* v. *Clark*, 123 Misc.2d 674, 474 N.Y.S.2d 409, 411 (N.Y. City Crim. Ct. 1984) ("Federal Courts, in particular, have condemned the practice of conditioning dismissal of criminal charges by the prosecutor upon the defendant's forfeiture of civil relief.")

In *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975), the Seventh Circuit addressed a release executed after arrest but before trial. Judge Cummings, writing for a unanimous court, held that the pre-conviction release was void as against public policy. *Id.* at 88. Similarly, in *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), the Circuit Court, addressing a "tacit agreement" to release civil rights claims in exchange for *nolle prosse* of criminal charges prior to trial, declared the arrangement as repugnant to public interests. *Id.* at 969. Likewise, in *Horne* v. *Pane*, 514 F.Supp. 551 (S.D.N.Y. 1981), the District Court addressed a release executed after arrest but prior to trial. Judge Knapp, writing for a unanimous court, declared the release invalid as a matter of law and stated:

> It seems to us beyond question that a criminal defendant forced to choose between being prosecuted on criminal charges on the one hand, and not being prosecuted but giving up certain constitutionally guaranteed civil rights on the other, cannot as a matter of law make an uncoerced decision.

Id. at 552.

Thus, the First Circuit decision below is in full accord with all three federal court decisions which have squarely addressed releases extracted after arrest, but while criminal charges were still pending. The Circuit Court below declined to apply "post-conviction" case holdings, such as in *Bushnell* v. *Rossetti*, 750

F.2d 298 (4th Cir. 1984) and *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), to the "pre-conviction" situation involved in the instant case. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985).

Hanging the threat of criminal indictment, prosecution, trial and conviction over the head of Respondent and forcing him to sign a covenant not to sue releasing his civil rights against public officials for their alleged wrongdoings, has left unremedied deprivations and violations to Respondent's constitutional rights. Prosecutors and police should not be given the opportunity to use pre-conviction release/dismissal practices as "swords" and "shields" in the judicial process.

D. *Pre-Conviction Release/Dismissal Practices Tempt Prosecutors to Trump Up Charges in Retaliation to/or in Anticipation of Civil Rights Claims.*

In *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970), plaintiff was asked to stipulate to probable cause in exchange for dismissal of a criminal charge. When plaintiff refused, the prosecution amended its criminal complaint and added a second charge. On appeal, the Ninth Circuit Court of Appeals held, as a matter of law, that the prosecutor's retaliatory conduct violated the public interest. *Id.* at 375.

Likewise, in *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), plaintiff filed a complaint with the police on the conduct of two officers. The prosecutor thereafter entered into a "tacit agreement" with plaintiff that if plaintiff did not proceed with his civil complaint, no criminal charges would be brought against him. Plaintiff proceeded with the civil complaint against the officers and the criminal charges were then brought back against him. The Court of Appeals declared:

> [Such agreements] tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly

> great when complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.

Id. at 969.

Further, in *North American Cold Storage Company* v. *County of Cook*, 531 F.Supp. 1003 (N.D. Ill. 1982), a taxpayer's case brought under 42 U.S.C. § 1983, Judge Grady speaking for a unanimous Court, found a release signed by plaintiff to be "offensive to public policy" and void as a matter of law. *Id.* at 1009. The Court stated:

> Plaintiffs claim that the use of the release and the final order offends public policy. . . .The use of those documents may suppress complaints regarding official misconduct or malfeasance. . . .The releases may prove offensive to public policy in another way. When officials have overassessed property, they may in bad faith refuse to lower the assessment until they have obtained a personal release from the taxpayer. . . .The use of such a release may be particularly disturbing in that it may entail the use of official power of the purse to protect government agents from personal liability.

Id.

While there is no direct evidence at this time in the case at bar demonstrating that Prosecutor Graf or the police retaliated against Respondent with criminal charges, the fact that pre-conviction release/dismissal practices *tempt* prosecutors and police to retaliate against criminal defendants, such as Respondent, is sufficient for pre-conviction release/dismissal practices to be declared void as against public policy.

Petitioners argue that the potential risk and danger to the public interest of prosecutorial misuse and abuse of covenants not to sue is insufficient to warrant a void *ab initio* rule against such arrangements. *Brief for Petitioners* at 22. Petitioners argue that a showing of actual injury to the public interest must first be demonstrated before a release is declared void. An actual showing of public injury, however, should not be required

before concluding that pre-conviction release/dismissal practices violate public policy. Contracts which tend, or will tend, to subvert legitimate and compelling public interests are contracts which contravene and violate public policy. *See Gray* v. *City of Galesburg*, 71 Mich.App. 161, 247 N.W.2d 338, 340-341 (1976), (*quoting Mahoney* v. *Lincoln Brick Co.*, 304 Mich. 694, 8 N.W.2d 883, 887-888 (1943); *Federoff* v. *Ewing*, 386 Mich. 474, 192 N.W.2d 242, 245-246 (1971)).

> The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words, all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present.

Id.

A desire by prosecutors and police to shield public officials from civil exposure offers an undeniable temptation to concoct and exaggerate criminal charges against an individual to enhance the government's bargaining position. Even the holding in *Bushnell* v. *Rossetti*. 750 F.2d 298 (4th Cir. 1984), which upheld a "post-conviction" release/dismissal practice, does not quarrel with those decisions voiding releases where the "potential" for forestalling exposure of possible constitutional or illegal government practices is present. *Id.* at 301.

E. *Pre-Conviction Release/Dismissal Practices Create Judicial Administration Problems.*

The decision below analyzed the public interest need for pre-conviction release/dismissal practices against public interest burdens which such practices present to the administration of justice, and determined that the administrative burdens

outweigh the need for such practices. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). The Court recognized that permitting any pre-conviction release/dismissal practices would encourage and "promote police and prosecutors' efforts to obtain such releases." *Id.*

Presently, the judicial system does not appear to be overburdened with cases involving pre-conviction release/dismissal practices in light of the dearth of reported cases on the issue. This is most likely because such arrangements historically have been condemned and disfavored by courts and law enforcement agencies alike. *Cf. Boyd* v. *Adams*, 513 F.2d 83, 89 n.6 (7th Cir. 1975) ("Apparently the state's attorney's office [of Illinois] recognized the dubious validity of the releases as secure in exchange for dismissal of charges. . ."); *Dixon* v. *District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968) ("These agreements have been publicly condemned by the government of the District of Columbia.")

If this Court were to adopt Petitioners' position and permit a case-by-case analysis of the surrounding circumstances for each pre-conviction release/dismissal practice, the sheer number of cases in the civil judicial system will increase dramatically. In addition to facing a substantial increase in caseload, courts will be required to make "extensive investigation" into each case. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). A case-by-case judicial determination into whether a pre-conviction release/dismissal practice was the product of coercion or not, will require a jury trial.

In *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 170 Cal.Rptr. 42 (1980), a case heavily relied on by Petitioners, plaintiff was arrested for disorderly conduct. The county prosecutor offered to dismiss the charge if plaintiff would sign a release of all civil claims against defendants. Plaintiff signed, and the criminal charges were dropped. Thereafter, plaintiff sued the defendants on state claims. The defendants raised the release as an affirmative defense. The Court submitted the defendants' affirmative defense to a jury for determination as to its validity. The jury implicitly found the

release valid and returned their verdict for the defendants. While *Hoines* did not involve the release of federal civil rights, the case demonstrates that jury presentation and determination should be part of the court's "extensive investigation" into the voidability of a covenant not to sue if a case-by-case approach is adopted.

Similarly, in the case of *Bucher* v. *Krause*, 200 F.2d 576 (7th Cir. 1952), the District Court submitted the issue of the validity of a release to a jury along with the case-in-chief. The jury found the release invalid and awarded plaintiff a verdict. Defendants appealed the jury determination insisting that the release issue should not have been submitted to a jury. *Id.* at 585. The Seventh Circuit held that the issue was properly submitted for jury determination. *Id.*

Likewise, in *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), also a case heavily relied on by Petitioners, appellant filed a civil rights action against public officials under 42 U.S.C. § 1983 (1979), *inter alia*. The District Court granted summary judgment to the defendants on the grounds that the appellant had signed a release in exchange for $500.00 paid to him. The Ninth Circuit reversed and remanded the case and declared:

> "...there is a triable issue of fact as to the validity of the release..."

Id. at 1206.

The holdings of *Hoines*, *Bucher* and *Jones* demonstrate that Respondent,[6] as well as any other civil claimant, has a right to a jury trial on the voidability of a covenant not to sue if a case-by-case determination is adopted.

Moreover, the need for pre-conviction release/dismissal practices is not important enough to overcome and outweigh the administrative burdens presented by such practices. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). The First Circuit recognized:

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[6] Respondent requested a jury trial on all allegations of violations of his federal civil rights. (J.A. 1—N.R. 1).

> A release of a civil rights claims might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a good defense to a civil rights claim will exist and the need for a release will not come into play. Thus, the exception to the general rule of invalidity [of such releases] has the anomalous character of not applying where the police may desire it, and applying where they do not need it.

Id. at 70.

Petitioners argue that pre-conviction release/dismissal practices are needed for the "protection of local law enforcement officials and private complainants from civil lawsuits, arising from their involvement or assistance in the administration of the criminal justice system." *Brief for Petitioners* at 13. Petitioners' argument, however, overlooks special protection afforded by statutory and judicially-created privileges and immunities for law enforcement officials and individuals involved in the criminal justice system. For example, public officials are entitled, *inter alia*,[7] to the "good faith" immunity defense as described most recently in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Likewise, individuals who report suspected criminal activity are entitled to certain statutory and judicially-created privileges and immunities.[8]

In balancing the public interest need for pre-conviction release/dismissal practices against the public interest burdens presented by such practices, it is clear that the administrative burdens created by such practices clearly outweigh the need for such practices.

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[7] Municipal, county and state law enforcement officials, *inter alia*, in New Hampshire are entitled to legal representation, defense and indemnification under most circumstances. N.H. Rev. Stat. Ann. 31:106 (Supp. 1985); N.H. Rev. Stat. Ann. 29-A (Supp. 1985) *et seq.*; N.H. Rev. Stat. Ann. 99-D (Supp. 1985) *et seq.*

[8] Individuals in New Hampshire who report criminal conduct in good faith are absolutely immune from defamation actions under most circumstances. *McGranahan* v. *Dahar*, 119 N.H. 758, 408 A.2d 121, 128 (1979); *see also* N.H. Rev. Stat. Ann. 169-C:31 (Supp. 1985) (immunity to individuals who report child abuse).

II. Pre-Conviction Release/Dismissal Practices Are Inherently Coercive and Should Not Be Condoned by This Court.

Pre-conviction release/dismissal practices exercised by prosecutors and police, as authorized agents of local, state and federal governments, are inherently coercive and evil tactics exercised against individuals in our society. Such mechanisms should not be condoned or sanctioned by this Court.

The gravamen of Petitioners' argument in support of these insidious tactics is both shocking and insulting to the reasonable and rational sensibilities of the public interest. The heart of Petitioners' argument is that:

> The rights protected by 42 U.S.C. § 1983 (1979), like any rights, are valuable *only* where the law permits the exchange of those rights for some form of desired consideration. Release/dismissal agreements provide criminal defendants with an *option*. They can preserve their rights under 42 U.S.C. § 1983 (1979), *take their chances at trial*, and if successful, seek monetary compensation in the civil courts, or they can *utilize those rights* in the criminal forum in an attempt to obtain a dismissal of charges against them. In many situations, such as in the case at bar, the release/ dismissal agreement is the *most attractive alternative*. (emphasis added).

See *Brief for Petitioners* at 21.

Respondent takes strong exception to Petitioners' view that an individual's constitutionally-guaranteed civil rights are valuable only when those rights may be bargained away or traded off. Constitutionally guaranteed civil rights are inherently valuable; they are the very foundation of a free, independent and democratic society. Individuals do not need a "bargain-basement sale" setting to inject value into constitutionally-guaranteed civil rights. There is virtually nothing more inherently valuable or sacred in the American experience than those rights protected by the United States Constitution and by 42 U.S.C. § 1983 (1979).

Petitioners contend that pre-conviction release/dismissal arrangements present individuals accused of crimes with a reasonable and attractive option: forfeit constitutionally-guaranteed civil rights or take one's chances at criminal trial. It is difficult to imagine any confrontation between an individual and a government which presents a more offensive and insidious setting than does the "attractive alternative" championed by Petitioners.

Of course an "attractive alternative" to an individual placed by a government in an inherently coercive setting is to opt for release from that setting. What individual would not? And what attorney representing an individual under such circumstances would not recommend signing such a covenant not to sue in exchange for criminal charges being dropped? To do otherwise would subject the client to criminal trial; and the attorney to possible legal malpractice. There is little doubt that any individual accused of a crime, when presented with a pre-conviction release/dismissal arrangement, would nor choose to extract himself/herself from the inherently coercive dilemma. *See People* v. *Wilmont*, 104 Misc.2d 412, 428 N.Y.S.2d 568 (N.Y. City Crim. Ct. 1980); *Kurlander* v. *Davis*, 103 Misc.2d 919, 427 N.Y.S.2d 376 (S. Ct. Monroe Co. 1980); *People* v. *Siragusa*, 81 Misc.2d 368, 366 N.Y.S.2d 336 (Nassau Co. Dist. Ct. 1975). Such submission, however, does not "render the bargain voluntary." *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 637, 170 Cal.Rptr. 42 (1980) (Tobiner, J., dissenting with Byrd, C.J., and Newman, J., concurring); *see Horne* v. *Pane*, 514 F.Supp. 551, 552 (S.D.N.Y. 1981); *Boyd* v. *Adams*, 513 F.2d 83, 88 (7th Cir. 1975).[9]

As Judge Timbers indicated in the decision below, the need to prohibit pre-conviction release/dismissal practices is in

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[9] Both *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975) and *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985) rejected arguments that such releases should be upheld dependent upon which party first suggested the release or whether the individual's attorney was involved in negotiating the release.

large part due to the important and special relationship between criminal prosecution and the public interest. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985). The primary objective of criminal litigation is to serve and protect the public interest; while the primary objective of civil litigation is to serve and protect private interests. Exchanging and releasing civil rights in a civil context is fundamentally different from exchanging and releasing civil rights for a decision to drop criminal charges in a criminal context. *Rumery* v. *Town of Newton*, 778 F.2d at 69. Prosecutors and police should not be permitted to "cross over the line" from the criminal forum to invade private interests in the civil arena.

In the case at bar, it was not part of Prosecutor Graf's proper role as a prosecutor or as an attorney to "bargain-away" the public interest decision to forego criminal charges against Respondent. When a pre-conviction release/dismissal arrangement is viewed in that light, it is no more than a "trade-off" of a public interest for a private interest. While there may be an indirect public interest in protecting public officials from civil liability incurred during employment, "if the officer's conduct was tortious, the public has no interest in denying their victims redress. If on the other hand, the public officers acted legally, they are afforded the full protection of the law and need not resort to the release for vindication." *Gray* v. *City of Galesburg*, 71 Mich.App. 161, 247 N.W.2d 338, 340 (1976).

Arrangements such as the one at bar are repugnant to public policy because they are inherently coercive and they deprive the public of vigorous enforcement of the laws for the dominant purpose of benefiting individuals. Such arrangements should not be encouraged or condoned by this Court.

III. Pre-Conviction Release/Dismissal Practices Are Unethical and Should Not Be Sanctioned, Condoned, Encouraged, Promoted, or Legitimized by This Court.

Some courts have gone so far as to suggest that pre-conviction release/dismissal practices are "akin to extortion." *See Sheppard* v. *Byrd*, 581 F.Supp. 1374, 1386 (N.D. Ga. 1984); *Horne* v. *Pane*, 514 F.Supp. 551, 552 (S.D.N.Y. 1981); *Boyd* v. *Adams*, 513 F.2d 83, 88 (7th Cir. 1975); *MacDonald* v. *Musick*, 425 F.2d 373, 375 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970). Other courts have suggested that pre-conviction release/dismissal practices may constitute the crime of "compounding a crime."[10] *See Williamsen* v. *Jernberg*, 99 Ill.App.2d 371, 240 N.E.2d 758, 760 (1st Dist. 1968); *cf. People* v. *Beggs*, 178 Cal. 79, 172 P. 152 (1918) (compounding a felony); *but see Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 632-33, 170 Cal.Rptr. 42 (1980). While such sentiments may be overstatements, pre-conviction release/dismissal practices are unethical under the Model Code of Professional Responsibility (1969).[11]

> DR7-105 *Threatening Criminal Prosecution.*[12]
>
> A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

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[10] The elements of "compounding a crime" generally are: "1) knowledge of commission of the original crime; 2) an a greement not to report or prosecute that crime; and 3) receipt of a consideration." Lipson, *Compounding Crimes: Time for Enforcement?*, 27 Hastings L.J. 175, 177 (1975).

[11] The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was last amended in August 1980. The Model Code was replaced by adoption of the Model Rules of Professional Conduct by the American Bar Association on Augu 2, 1983. Since the pre-conviction release/dismissal practice at bar occurred prior to August 2, 1983, discussion of the Model Code is relevant.

[12] Under the Model Rules for Professional Conduct (1983), there is no precise equivalent to DR7-105.

Ethical Consideration 7-21 of the Model Code of Professional Responsibility (1969) articulates the rationale for DR7-105.

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to sue, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

The prohibition set forth in DR7-105 and EC7-21 against threatening criminal prosecution to obtain a civil advantage carries forward the same principle which was contained in Canon 15 of the Canons of Professional Ethics (1908).[13] R.L. Wise, *Legal Ethics*, at 97 n.9 (2d Ed. 1970).

Direct or indirect efforts by attorneys to present criminal charges against an individual to obtain an advantage in a civil matter have long been condemned by courts as unethical. *Bluestein* v. *State Bar*, 13 Cal.3d 162, 529 Pac.2d 599, 118 Cal.Rptr. 175 (1974); *In re Gelman*, 230 A.D. 524, 527 N.Y.S. 416 (1930); *In re Hyman*, 226 A.D. 468, 235 N.Y.S. 622 (1929); *People ex rel. Brundage* v. *Blakemore*, 309 Ill. 311, 141 N.E. 138 (1923). Likewise, prosecuting attorneys have been severely sanctioned by the bar for threatening criminal prosecution to obtain advantage in civil litigation. *In re Joyce*, 182 Minn. 156, 234 N.W. 9 (1930); *In re Bunston*, 52 Mont. 83, 155 P. 1109 (1916).

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[13] *Canon 15.* A lawyer is not obliged to use improper or illegal means to serve his client.

The same code of ethics which applies for private attorneys applies equally to public prosecutors. ABA Model Code of Professional Responsibility, EC7-13; 7-14; DR7-301(A). In addition to being bound to the Model Code of Professional Responsibility, prosecutors are subject, *inter alia*, to the American Bar Association Standards Relating to the Prosecution Function (Approved Draft 1971). While the ABA Standards permit a prosecutor to consider a range of factors that bear on the merits of prosecution, no authority permits a prosecutor to consider personal or private advantages that might accrue to himself or third parties from the exercise of power. *See* ABA Standards Relating to Prosecution Function, § 3.9(b) (Approved Draft 1971); *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 635, 170 Cal.Rptr. 42 (1980) (Tobiner, J. dissenting).

The case at bar demonstrates that a prosecutor's consideration of third party interests (i.e. police officers, municipalities, witnesses) undermines legitimate objectives of a prosecutor's discretion. Prosecutor Graf had serious concerns about the prosecution of Respondent prior to his arrest. To condone the prosecutor's continued criminal prosecution of Respondent, unless Respondent was willing to forfeit his civil rights, would be to condone irresponsible conduct by the prosecutor. If a prosecutor determines that criminal charges should be dismissed, then the prosecutor's "plain duty" is to dismiss the charges without stipulation. *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d at 636, 170 Cal.Rptr. 42 (1980). To permit a prosecutor to act as judge, jury, and prosecutor, as well as private attorneys for third parties, goes too far beyond his ethical obligations to the public.

> To permit a prosecuting attorney to have an interest of any nature whatsoever in any civil proceedings, directly or indirectly, and which proceedings involve similar facts or the same subject matter as a criminal prosecution then pending or thereafter initiated, can only give rise to suspi-

> cion concerning and relating to the motives of the prosecuting attorney involved, and bring such office into disrepute with the public.

State v. *Detroit Sales*, 62 N.J.Super. 336, 163 A.2d 227, 231 (1960).

IV. Pre-Conviction Release/Dismissal Practices Are Clearly Different From Plea Bargain Practices and the Two Practices Should Not Be Confused.

Petitioners rely heavily on plea-bargain practices in an attempt to justify pre-conviction release/dismissal practices. *Brief for Petitioners* at 26-29. Such reliance, however, is unfounded since there are significant and fundamental differences between the public interests involved in pre-conviction release/dismissal practices. Moreover, plea-bargaining practices have many opponents and critics, and the practice should not be used to permit pre-conviction release/dismissal practices.

The most fundamental difference between plea-bargaining practices and pre-conviction release/dismissal practices is obvious: in the former, the practice is limited to the criminal justice system; whereas in the latter, the practice confuses the civil and criminal justice systems. In plea-bargaining practices, there is a "mutuality of advantage" to the state and defendant. *Brady* v. *United States*, 397 U.S. 742, 752 (1970). The state's benefits include: 1) the more promptly punishment is imposed after an admission of guilt, the more effectively the objective of punishment may be served; 2) judicial and prosecutorial resources are conserved for those cases in which there is substantial issue of a defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof; 3) the public is protected from the risks posed by those charged with crimes who are at large or on bail while awaiting completion of criminal proceedings; 4) plea-bargaining leads to prompt and final disposition of many criminal cases; 5) plea-bargaining

avoids the corrosive impact of enforced idleness during pre-trial; and 6) by shortening the time between charge and disposition, plea-bargaining enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately sentenced. A defendant's benefits include: 1) avoidance of an extended pre-trial incarceration; 2) avoidance of uncertainty of a criminal trial; 3) speedy disposition of the case; 4) the opportunity to acknowledge and admit guilt; 5) a prompt start towards rehabilitation; and 6) potential leniency. *See generally Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Santobello* v. *New York*, 404 U.S. 257 (1971); *Brady* v. *United States*, 397 U.S. 742 (1970); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). It is this "mutuality of advantage" to the state and defendant that probably explains why well over three quarters of all criminal convictions in the United States rest on pleas of guilt. *See Brady* v. *United States*, 397 U.S. at 752 n.10.

In the case at bar, the State of New Hampshire, the moving party in the criminal matter against Respondent, was not a party to the release, and therefore, received no benefit from it. The private interests of Mary Deary, the Police Department and the Town of Newton were protected and benefited. Moreover, the prosecutor threatened to go forward with an unnecessary criminal trial, which would have incurred needless state expenditures, in order to compel Respondent to agree to the release.

A significant problem with permitting prosecutors and police to bargain for civil releases in a criminal context is that it raises public suspicion that the decision not to prosecute has been tainted, and thereby undermines public confidence in both the civil and criminal justice systems. While Prosecutor Graf acted within proper limits in deciding to *nolle prosse* criminal charges against Respondent, he exceeded his discretion by disposing of Respondent's civil claims and protecting third party interests. Unlike plea-bargaining practices, the primary objective in pre-conviction release/dismissal practices is not to serve

the public interest; it is to shield private individuals from civil exposure and use releases as exculpatory tools. Such conduct is a dangerous and unwarranted extension of the plea-bargain concept and it should not be condoned by this Court.

Conclusion

WHEREFORE, the Respondent prays:

A. That the decision of the First Circuit Court of Appeals be affirmed; or in the alternative,

B. That the pre-conviction extraction of a covenant not to sue under threat of criminal indictment and prosecution be found to be void as against public policy.

Respectfully submitted,

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